No. 22,676

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

TANNER MOTOR LIVERY, LTD.,
Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF ISSUE PRESENTED

Whether under the circumstances presented the Board properly determined that employees Martin Abramson and Sanford Dorbin were discharged for engaging in protected activity notwithstanding Section 9(a) of the Act.

STATEMENT OF THE CASE

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*),[1] for enforcement of its supplemental order issued against respondent Company on June 30, 1967, and reported at 166 NLRB No. 35 (R. 71-74).[2] On June 29, 1965, this Court issued an opinion (349 F.2d 1) remanding the Board's order in the original proceeding, reported at 148 NLRB 1402 (R. 32-37). This Court has jurisdiction under Section 10(e) and (f) of the Act.

In its initial decision, the Board found that the Company violated Section 8(a)(1) of the Act by discharging two employees for engaging in peaceful, concerted activities protected by Section 7 of the Act and for threatening one of those employees, who had been reinstated, with a future discharge if he continued to engage in the same activity. This Court, in agreement with the Board, held that the discharged employees' concerted efforts to secure racially integrated working conditions constituted protected activity under Section 7 of the Act. However, the Court remanded the case for consideration of whether an employer may lawfully discharge employees who engage in otherwise protected concerted activities, or who picket in support of such activities, when there is an established collective-bargaining representative having a contract with the em-

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[1] The pertinent statutory provisions are reprinted in Appendix A, *infra,* pp. 19-21.

[2] References to the pleadings, the original decision and order of the Board, the supplemental decision and order, and other papers in the original and supplemental proceedings reproduced as "Volume I, Pleadings" are designated "R". References to the stenographic transcript reproduced and filed with the Court are designated "Tr." References designated "GC Exh." are to the General Counsel's exhibits in the original proceeding. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

ployer and the employees do not act or seek to act through that representative. On remand, the Board reaffirmed its previous conclusion that the discharges and threat to discharge interfered with the exercise of the employees' rights under Section 7 of the Act and thereby violated Section 8(a)(1) of the Act. The relevant facts are fully set forth in the Court's opinion and may be summarized as follows:

I. THE BOARD'S FINDINGS OF FACT

Martin Abramson and Sanford Dorbin, taxicab drivers at the Santa Monica branch of respondent Company, decided in mid-July 1963, to try to persuade the Company to racially integrate the work force (R. 13; Tr. 11-14, 61-62).[3] Thereafter, Abramson conferred with Elbert Kellough, a Negro with previous cab-driving experience who was interested in working at Tanner (R. 13; Tr. 93). On July 23, 1963, Abramson talked to Frank Barrial, manager of respondent's Santa Monica branch, who told him that he had no objections to hiring a Negro, and that he had on file the application of a Negro whom he intended to hire at the first opportunity. Abramson asked Barrial if he would consider Kellough for employment. Barrial agreed to see Kellough the next day (R. 13; Tr. 7-9). Barrial informed him there were no openings but gave him an application which Kellough subsequently filed (R. 13; Tr. 30-31, 94-95).

On July 24, Barrial had separate conversations with Abramson and Dorbin about the Company's hiring policy (R. 13-14; Tr. 17-19, 64-66). On July 29, Abramson again went to see Barrial and was handed an inter-

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[3]The Company employed between 50 and 60 drivers at its Santa Monica branch, none of whom were Negro, although Negroes were employed at other branches (R. 73, n. 6, 13; Tr. 10, 88, 104).

departmental memo from the Company's Operations Manager, John Hughes, informing him that he was discharged because of his involvement in two accidents on July 24 and 25, respectively, resulting in damage to his cab (R. 14; Tr. 33-34, GC Exh. 2). Abramson protested to Barrial that he had been doing a good job during the year and a half that he was with the Company and asked Barrial whether he or Hughes had caused his discharge. Barrial replied that Hughes had directed his discharge and that if it were up to him he would not have discharged Abramson (R. 14; Tr. 35-36).

At this same meeting, Abramson expressed concern about the fact that three drivers had been hired that week, but no effort was made to communicate with the Negro applicants. Abramson asked Barrial why he had not contacted them, to which Barrial replied that he had been unable to locate the applicant whom he mentioned at their first meeting as he could not find his application and did not know his name (R. 15; Tr. 36). As for Kellough, Barrial stated that he had a criminal record and was too old. Abramson pointed out that other drivers had criminal records and that most of the drivers were past 40. He mentioned one driver who was 70 and had been hired when he was past 50. To this Barrial replied that he wanted to start hiring "young guys" and in any event when he hired a Negro he wanted him to be "sharp" (R. 15; Tr. 37). Regarding the other Negro applicant, Abramson told Barrial that he had talked to the supposed applicant and discovered that Barrial had failed to give him an application (Tr. 36-37).

On August 1 Abramson, joined by representatives of several civil rights groups, began picketing the Company. Abramson carried a sign which bore the message "Jim Crow Shop" (R. 15; Tr. 38-39). Dorbin

joined the picket line on the afternoon of August 6; that evening he received the following telegram:

> DISCHARGED FOR CONDUCT NOT IN KEEPING WITH COMPANY POLICY
>
> NICK LARI APPROVED BY FRANK BARRIAL AND WILLIAM KNIGHT
>
> (R. 15; GC Exh. 3, Tr. 73-74.)

Dorbin immediately called Nick Lari, the dispatcher in charge of the office during the evening shift (R. 15; Tr. 122-123). Dorbin inquired in what respect his conduct was not in keeping with Company policy. Lari admitted that he had initiated Dorbin's discharge because of his participation in the picket line. He added that he had called Knight, a Company vice president, who had dictated the actual wording of the telegram (R. 15; Tr. 74-75). Dorbin then called Abramson and asked him to call Lari and verify his discharge. To Abramson's inquiry, Lari responded that Dorbin was discharged because "he went out there and picketed with you Negro-lovers" (R. 15; Tr. 41-42, 76).

The following day Dorbin was reinstated. Operations Manager Hughes, when he found out that Dorbin had been discharged for participating in the picket line, ordered Ronald Davis, manager of the Company's Pasadena-Glendale branch, to contact Dorbin and offer him reinstatement (R. 16; Tr. 147-149). Davis, who was substituting for Barrial, then on vacation, told Dorbin that a mistake had been made (R. 16; Tr. 103). He discussed Dorbin's picketing activities and questioned whether it was right for an employee to picket his company (R. 16; Tr. 107, 80-82). He concluded by telling Dorbin that while his discharge had been "a mistake," "there are a lot of reasons to fire a guy, you know, and the next time it won't be a mistake" (R. 16; Tr. 82).

II. THE BOARD'S CONCLUSION ON REMAND

The Board reaffirmed its previous conclusion that respondent Company, by discharging Abramson and Dorbin, and by threatening to discharge Dorbin, interfered with the exercise of the employees' rights under Section 7 of the Act.[4] In reaching this conclusion the Board found it unnecessary to determine whether the discharged employees had attempted to act through their bargaining agent. Determining whether the employees were filing a grievance within the meaning of the proviso to Section 9(a) of the Act, or seeking to bargain individually with their employer, was also considered unnecessary, for, as the Board decided, in either event the employees were not acting in derogation of their established bargaining agent by seeking racially integrated working conditions.

Accordingly, the Board reaffirmed its original order requiring the Company to cease and desist from the unfair labor practices found, to reinstate Abramson[5] with back pay and to post an appropriate notice.

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT

A. Introduction

In its prior ruling herein, the Court affirmed the Board's conclusion that employees Abramson and Dorbin were discharged because of their efforts to secure racially integrated working conditions. This Court further held that if Abramson and Dorbin had not been represented by a collec-

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[4]Member Brown, dissenting, would have dismised the complaint.

[5]No order requiring reinstatement or back pay regarding Dorbin was entered as he was offered and accepted full reinstatement on August 7, and suffered no loss of pay (R. 34, n. 6; Tr. 84).

tive bargaining agent their activities would undoubtedly enjoy the protection of Section 7 of the Act and respondent would be guilty of an unfair labor practice in discharging them because of those activities. The question presented by the remand is whether the employees' efforts to secure racially integrated working conditions loses the protection of Section 7 by virtue of the principle of exclusive bargaining embodied in Section 9(a) of the Act.

In the circumstances of this case, the Board found it unnecessary to determine whether Abramson and Dorbin had attempted to act through their established bargaining representative before addressing their concerted protest directly to their employer. The Board also deemed it unnecessary to determine if the employees were presenting a grievance or seeking to bargain, within the meaning of Section 9(a). It was the Board's view that irrespective of the answers to these questions, the employer had nevertheless committed an unfair labor practice in discharging Abramson and Dorbin. In the Board's judgment the conduct of these two employees could not be considered to undercut or imperil the Union's status as exclusive bargaining agent. Moreover, the Board noted that it has never been contended that these employees were discharged because they failed to act through their bargaining representative. Thus, even if that failure were to render an aspect of their conduct unprotected, it cannot be relied upon by this employer as an affirmative defense to the charged unfair labor practice.

We show below that the Board's reaffirmance of its initial order is sustainable on either of these grounds.[6]

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[6]The Board's finding that Company Branch Manager Davis unlawfully threatened Dorbin with discharge if he continued engaging in his protest activity (R. 34, 16; Tr. 82) was not discussed by the Court in its original opinion. By its terms, this threat would be applicable even if Dorbin proceeded through the Union in his future efforts

B. Section 9(a) of the Act did not render unprotected the concerted activity of employees Abramson and Dorbin

The concept of exclusive bargaining has its basis, of course, in Section 9(a), which provides that the representatives selected by the majority "[are] the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." It has been invoked to forbid an employer from attempting to undercut the duly selected collective representative by ignoring it and bargaining only with the individual employees themselves (*Medo Photo Corp. v. N.L.R.B.*, 321 U.S. 678) or by refusing to bargain with the selected representative in reliance upon individual contracts between the employer and its employees (*J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332). Thus interpreted, the section serves the cause of "orderly collective bargaining" (*Medo Photo Corp. v. N.L.R.B., supra,* 321 U.S. at 685), and comports with the Act's declared policy of encouraging collective bargaining. Section 1 of the Act. The concept of exclusive representation has also been applied to render unprotected economic pressure by employees which is designed to achieve a purpose contrary to that of the chosen representative.[7]

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to change Tanner's hiring policy. Thus, the question posed by the Court has no bearing on this aspect of the case, and the Board's cease and desist order relating to this threat should be affirmed irrespective of the correctness of the Board's decision on remand.

[7] *N.L.R.B. v. Sunset Minerals,* 211 F.2d 224 (C.A. 9) (minority walkout in violation of contract to compel employer to cure certain grievances); *N.L.R.B. v. Draper Corp.,* 145 F.2d 199 (C.A. 4) (minority strike found to be interference with collective bargaining by duly authorized agent); *Plasti-Line, Inc. v. N.L.R.B.,* 278 F.2d 482 (C.A. 6) (dissident minority strike in violation of no-strike provision).

However, where the economic pressure of employees, albeit initiated by a minority, cannot be said to undercut the bargaining representative's status, the protection of Section 7 is not withdrawn. See *N.L.R.B. v. R.C. Can Co.*, 328 F.2d 974, 978-979 (C.A. 5); *Western Contracting Corp. v. N.L.R.B.*, 322 F.2d 893, 897-899 (C.A. 10); *Hamilton v. N.L.R.B.*, 160 F.2d 465, 469-471 (C.A. 6), cert. den., 332 U.S. 762. Certainly if there were an identity of goals between the Union and these protesting employees, the fact that the Union did not trigger the protest or the economic pressure in support of it would not render the employees' conduct unprotected. *N.L.R.B. v. R.C. Can Co., supra,* 328 F.2d at 978-979; *Western Contracting Corp. v. N.L.R.B., supra,* 322 F.2d at 897; *Hamilton v. N.L.R.B., supra,* 160 F.2d at 469-471. On the facts of this case, the bargaining representative was precluded from taking a position contrary to the employees' and, we submit, their protest is entitled to protection under Section 7 of the Act.

The bargaining agent is under a duty to represent the employees fairly, and this duty includes the requirement that it neither practice nor tolerate racial discrimination. See *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO v. N.L.R.B.*, 368 F.2d 12, 17 (C.A. 5), cert. denied, 389 U.S. 837; *Local 1367, International Longshoremen's Association, AFL-CIO (Galveston Maritime Association, Inc.),* 148 NLRB 897; enforced, *per curiam,* 368 F.2d 1010 (C.A. 5), cert. denied, 389 U.S. 837; *Independent Metal Workers Union Local No. 1 (Hughes Tool Company),* 147 NLRB 1573.[8] Thus, if the bargaining agent

[8]Initial enforcement of a union's duty of fair representation was procured in the courts under the doctrine stated in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192; see, e.g., *Syres v. Local 23, Oil Workers,* 350 U.S. 892. In 1962, the Board decided that a breach of the duty of fair representation constitutes an unfair labor practice cognizable under the Act. *Miranda Fuel Co.*, 140 NLRB 181. While this doctrine on

acquiesces in the employer's discrimination, it has failed in its representative duty.

Therefore, this case cannot be classified with those cases in which a dissident minority group seeks to achieve a purpose at odds with a bargaining decision of the chosen and exclusive representative.[9] Moreover, the employees' protest for racially integrated conditions reflected the avowed policy of both their state and nation.[10] It should not be assumed that their bargaining representative would have taken a contrary unlawful position. See, *Local 357, IBT v. N.L.R.B.*, 365 U.S. 667, 676. Accordingly, as the Board held (R. 73), it must be assumed "that these employees were acting in accord with, and in furtherance of, the lawful position of their collective bargaining agent." It would distort the intent of Section 9(a)

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initial review received the acceptance of only one member of a Second Circuit panel (*N.L.R.B. v. Miranda Fuel Co., Inc.*, 326 F.2d 172 (C.A. 2), the Board's position has subsequently won firmer acceptance. *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO v. N.L.R.B., supra; Local 1367, International Longshoremen's Association, AFL-CIO v. N.L.R.B., supra.*

And in *Vaca v. Sipes*, 386 U.S. 171, a Supreme Court majority, in the course of reversing a state court's determination that a union member could not collect damages from a union which had not pressed his grievance against an employer to arbitration, addressed itself to the question of federal preemption. *Id.*, at 176-188. A necessary premise of the majority's discussion of the preemption issue "was its explicit assumption that unfair representation is an unfair labor practice." *Truck Drivers and Helpers, Local Union 568 v. N.L.R.B.*, 379 F.2d 137, 141-142 (C.A.D.C.). See also, the concurring opinion of Justice Fortas in *Vaca*, joined by the Chief Justice and Justice Harlan. 386 U.S. at 198 ("a claim that the union has breached its statutory duty of fair representation is a claim of unfair labor practice . . . .").

[9]E.g., *N.L.R.B. v. Sunbeam Lighting Co.*, 318 F.2d 661 (C.A. 7); *Harnischfeger Corp. v. N.L.R.B.*, 207 F.2d 575 (C.A. 7); *N.L.R.B. v. Draper Corp.*, 145 F.2d 199 (C.A. 4).

[10]West Ann. Cal. Codes: Labor Code § 1420(a); Civil Rights Act of 1964, Title VII, Equal Employment Opportunity, Section 703(a), 78 Stat. 255, 42 U.S.C. § 2000e-2(a).

and offend public policy to hold that the employees' expression of concern on this vital issue was unprotected.[11]

In sum, while recognizing that Section 9(a) is intended, in part, to protect the majority choice against interference by minority action, we contend that where no interference can possibly be shown it would be unwarranted to require all complaints and economic pressure to emanate from the bargaining representative.[12] Here, there could exist no conflict of policies and hence the bargaining representative has not been weakened by minority action. The facts of this case show simply that two employees were discharged after speaking out on a matter of crucial importance for them as members of a bargaining unit and as citizens. The employer should not be permitted to invoke Section 9(a) as a *post hoc* justification for his retaliatory discharges where, as here, "there is not a single stitch of evidence to indicate that [the protesting employees'] action put the Employer in any sort of quandary. It was not put in the position of choosing between

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[11] *Black-Clawson Co. v. I.A.M., Lodge 355, District 137,* 313 F.2d 179 (C.A. 2), does not support a contrary conclusion. The court decided in that case that Section 9(a) "does not confer upon an individual grievant the power, enforceable in a court of law, to compel the employer to arbitrate his grievance." *Id.*, at 184. This proposition (compare *Hughes Tool Co. v. N.L.R.B.*, 147 F.2d 69, 72 (C.A. 5); *Donnelly v. United Fruit Co.*, 40 N.J. 61, 190 A.2d 825, and *Vaca v. Sipes, supra,* 386 U.S. at 184-186) has no application in the instant case, where the employer discharged employees for their adherence to a position after having conferred with them on the matter of protest. Whether or not these employees could have sued their employer under the contract cannot be deemed to control the issue whether their activity in raising the complaint was unprotected. The "right to sue" under a collective bargaining agreement should not be equated in this case with the Section 7 right to be free from retaliatory action.

[12] See Cox, *The Right To Engage In Concerted Activities,* 26 Ind. L.J. 319, 332 (1951): "Much can be said in favor of aggressive unions whose leaders are constantly pricked to action by militant minorities."

the demands of the Union and the demands" of Abramson and Dorbin. *N.L.R.B. v. R.C. Can Co., supra,* 328 F.2d at 979.

C. The Company discharged Abramson and Dorbin because of its opposition to their concerted activity and not because of their failure to act through the Union

The Board's finding, accepted by this Court, is that Abramson and Dorbin were discharged for seeking integrated working conditions. Even assuming, *arguendo,* that these employees' protest had an unprotected aspect in that they did not proceed through their bargaining representative, it is clear that they were not discharged for that reason. The Company, through its Santa Monica branch manager, Frank Barrial, freely discussed the hiring policy *vis-a-vis* Negro applicants with Abramson and Dorbin. At no time did the Company decline to discuss their complaint on the basis that such discussion would interfere with "orderly bargaining" or undermine the recognized representative. If the Company was going to take the position that it would only deal with the Union on this matter, it should have advised the employees of this at the outset.

There is no suggestion that the Company apprised the Union of the employees' complaint, even after it had discharged them, and no suggestion that the Company ever attached any importance whatever to the failure of the employees to proceed through the Union. Rather, supervisor Lari told Abramson that Dorbin had been discharged because he had "picketed with you Negro-lovers" (Tr. 41-42). Moreover, Dorbin was reinstated the next day and was told that a mistake had been made. At this time Dorbin's picketing activities were discussed and management only questioned whether it was right for an employee to picket his company. No mention was made of the failure to proceed through the Union and Dorbin was obviously reinstated notwithstanding that failure.

This evidence when considered together with the Company's carefully developed pretext for Abramson's termination and its explanation for the reinstatement offer to Dorbin (Tr. 147-148), demonstrates conclusively that the principle of exclusive representation had nothing to do with the discharge of these employees. Rather, it is clear that the penalty of discharge was meted out because the Company was opposed to employee picketing aimed at obtaining an integrated work force. The presence of an unprotected element in the means used to obtain that object cannot serve as a defense where the employer's dissatisfaction relates solely to the protected aspects of the conduct. See *N.L.R.B. v. E. W. Buschman Co.*, 380 F.2d 255, 257-258 (C.A. 6), cert. denied, 389 U.S. 1045; *N.L.R.B. v. Anchor Rome Mills*, 228 F.2d 775, 782 (C.A. 5); *N.L.R.B. v. Murray-Ohio Mfg. Co.*, 358 F.2d 948, 950 (C.A. 6); *Cone Brothers Contracting Co.*, 158 NLRB 186, 212. Cf. *N.L.R.B. v. Puerto Rico Rayon Mills, Inc.*, 293 F.2d 941, 946-948 (C.A. 1); *N.L.R.B. v. Berg-Airlectro Co.*, 302 F.2d 474, 475 (C.A. 7).

Directly relevant in this connection are cases dealing with the doctrine of condonation.[13] Those cases teach that an employer, having once condoned the unprotected aspect of concerted employee conduct, may not thereafter rely upon such activity as ground for reprisal; for by such action the employer "is indicating its real concern is with the concerted nature of the activity, and not with its unprotected aspects." *Brantley Helicopter*

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[13] See, e.g., *Confectionery & Tobacco Drivers v. N.L.R.B.*, 312 F.2d 108, 113 (C.A. 2); *N.L.R.B. v. E. A. Laboratories*, 188 F.2d 885, 886-887 (C.A. 2), cert. denied, 342 U.S. 871; *Stewart Die Casting Corp. v. N.L.R.B.*, 114 F.2d 849, 855-856 (C.A. 7), cert. denied, 312 U.S. 680; *N.L.R.B. v. Aladdin Industries*, 125 F.2d 377, 382 (C.A. 7), cert. denied, 316 U.S. 706; *Alabama Marble Co.*, 83 NLRB 1047, 1048, enforced, *per curiam*, 185 F.2d 1022 (C.A. 5), cert. den., 342 U.S. 823; *Brantley Helicopter Corp.*, 135 NLRB 1412, 1416-1418. Compare *N.L.R.B. v. Marshall Car, Wheel & Foundry Co.*, 218 F.2d 409, 414 (C.A. 5); *Plasti-Line, Inc. v. N.L.R.B.*, 278 F.2d 482, 485 (C.A. 6).

Corp., supra, 135 NLRB at 1418. Here, as shown above, the Company voluntarily acceded to the employees' requests to discuss a condition of employment. Having discharged the employees not because they sought to deal directly with him but because of their concerted adherence to the object of an integrated work force, the defense of direct bargaining should not be open to it.[14]

D. The alleged partial termination of respondent's business subsequent to the proceedings below is irrelevant here

Noting that after the completion of the instant case on remand, the Board reopened another case against respondent and consolidated that case with two other pending cases to determine certain issues of successorship, respondent argues here (R. 84) that this case should be remanded for the

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[14] In *N.L.R.B. v. Lundy Manufacturing Corp.,* 316 F.2d 926 (C.A. 2), cert. denied, 375 U.S. 895, a Section 9(a) defense was rejected, and an employer was found to have unlawfully refused to bargain with a dissident employee group. In reaching that conclusion the court emphasized that no grievance machinery existed through which the dissident group could have presented its complaints. *Id.,* at 926. Here, whether or not such machinery existed, it is clear that the Company was not insisting upon that procedure; and that, therefore, its discharge of Abramson and Dorbin had no relationship to its rights or the rights of the exclusive representative under the collective bargaining agreement.

Contrary to the assertion in respondent's Answer, we respectfully submit that the Board's decision on remand was consistent with the Court's direction that it consider to what extent Section 9(a) limits or removes the protection afforded Abramson and Dorbin by Section 7. The Board's determination that the discharged employees could not have been acting in derogation of a lawful position of their bargaining agent obviated the need for reopening the record or determining whether the employees were presenting a grievance. Accordingly, the Board's decision was well within its discretion at this stage of the proceeding. See *N.L.R.B. v. Don Juan Co.,* 185 F.2d 393, 394 (C.A. 2); *N.L.R.B. v. Western & Southern Life Insurance Co.,* 391 F.2d 119, 121 (C.A. 3); *N.L.R.B. v. Lundy Manufacturing Corp.,* 316 F.2d 921, 923 (C.A. 2), cert. denied, 375 U.S. 895. Cf. *F.T.C. v. Colgate-Palmolive Co.,* 380 U.S. 374, 382-384; *F.C.C. v. Pottsville Broadcasting Co.,* 309 U.S. 134, 145.

purpose of consolidation even "if the Court finds that Respondent violated the Act" in order that two other companies—allegedly successors—may be joined as respondents and a decision may be made "consistent" with the consolidated case now pending before the Board. It remains unclear whether respondent is asserting that its alleged discontinuance of certain of its business operations renders this enforcement proceeding moot, or that possible liability of its "successors" must be determined before the Board's order herein can be enforced. In either case, we submit, respondent is incorrect.

The Board's order, in pertinent part, requires the reinstatement, with backpay, of employee Abramson and the posting of appropriate notices. If respondent is contending that it would be unable to comply with these provisions because it is no longer owner of, or connected with, the employing business, such is not a defense to the entry of a decree. If its order is enforced, the Board will determine, in a subsequent proceeding, whether compliance with all or part of its order is possible and will, of course, excuse the non-performance of any "impossible" obligation. Moreover, if the Board were to insist upon unwarranted acts of compliance, the right of a defunct respondent would be fully protected by the Court in the ensuing contempt action.

This was precisely the approach which the Supreme Court followed in *Southport Petroleum Co. v. N.L.R.B.*, 315 U.S. 100. There, the employer argued that the Board's order (directing it to cease and desist from certain unfair labor practices, to post notices and to reinstate employees with backpay) should not be enforced because the corporation involved had been dissolved and its assets transferred to totally disinterested purchasers. The Supreme Court affirmed the Court of Appeals' refusal to permit the em-

ployer to adduce additional evidence establishing the dissolution and transfer, commenting as follows (*Ibid.*, at 106-107):

> Implicit in the reinstatement provision of the Board's order was a condition of the continued operation by the offending employer (of his business) . . . Whether there was a *bona fide* discontinuance and a true change of ownership—which would terminate the duty of reinstatement created by the Board's order—or merely a disguised continuance of the old employer, does not clearly appear, and accordingly, is a question of fact properly to be resolved by the Board on direct resort to it, or by the Court if contempt proceedings are instituted.
>
> The additional evidence was immaterial for the further reason that the Board's order ran not only to the petitioner, but also to its 'officers, agents, successors, and assigns.' [footnote omitted] Granting the truth of every one of petitioner's allegations, it still is possible that the Board's order may yet be the basis—and the indispensable basis—of liability on the part of any of these persons, regardless of any present incapacity of petitioner to perform, or liability on its part for failure to perform, its duty of reinstatement.

In essentially identical situations numerous other courts of appeals have granted full enforcement of the Board's order holding that the extent to which compliance is possible is properly determined by the Board in a subsequent proceeding. *N.L.R.B. v. Haspel,* 228 F.2d 155, 156 (C.A. 2); *N.L.R.B. v. Somerset Classics, Inc.,* 193 F.2d 613, 615-616 (C.A. 2), cert. denied, 344 U.S. 816; *N.L.R.B. v. Lamar Creamery Co.,* 246 F.2d 8, 10 (C.A. 5); *N.L.R.B. v. Talladega Cotton Factory, Inc.,* 213 F.2d 209, 215 (C.A. 5); *N.L.R.B. v. Cordele Mfg. Co.,* 172 F.2d 225 (C.A. 5); *N.L.R.B. v. Caroline Mills, Inc.,* 167 F.2d 212, 214 (C.A. 5); *N.L.R.B. v. Electric Steam Radiator Corp.,* 321 F.2d 733, 738 (C.A. 6); *N.L.R.B. v. Acme Mattress, Inc.,* 192 F.2d 524 (C.A. 7); *Indianapolis Power & Light Co. v. N.L.R.B.,* 122 F.2d 757, 765 (C.A. 7), cert. denied, 315 U.S. 804; *N.L.R.B.*

v. National Garment Co., 166 F.2d 233, 238-239 (C.A. 8), cert. denied, 334 U.S. 845. Thus, we submit, respondent's allegation (R. 83 that it "is not longer engaged in the taxicab business" is not grounds for a refusal to enforce the Board's order.[15]

If respondent is claiming that the other companies it names—Pacific Coast Transportation Company and West Coast Transportation Co.—must be joined as respondents in this case before an enforceable decree can issue, it is also in error. The Board in *Perma-Vinyl Corp.*, 164 NLRB No. 119, 65 LRRM 1168, enforcement pending *sub nom., United States Pipe & Foundry Co. v. N.L.R.B.*, No. 24,837 (C.A. 5), announced the rule that an independent purchaser of a continuing enterprise, who takes with knowledge of outstanding unremedied unfair labor practice charges, will ordinarily be held responsible for remedying the unfair labor practices of its predecessor. The unfair labor practice in the instant case occurred in July and August of 1963, two years before the alleged transfer of respondent's business. The Board's order in this case runs to respondent's "successors and assigns" (R. 35). As pointed out above, the Board may "defer its consideration of the remedial detail whether its order can be directed derivatively against parties other than the employer actually found guilty of the unfair labor practice in question." *N.L.R.B. v. C. C. C. Associates, Inc.*, 306 F.2d 534, 540 (C.A. 2). If these companies are successors, they could have intervened in this proceeding. Moreover, as purchasers of the employing enterprise, they will have full opportunity to litigate the issue of their liability

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[15] In any event, the backpay obligation remains even if respondent is no longer in the taxicab business and it is possible that there may be substantially equivalent employment to which Abramson could be reinstated in those portions of respondent's enterprise which are still in operation.

at the compliance stage of this proceeding when a decree enforcing the Board's order issues.

In any event, respondent has no standing to ask that this decree should not issue because other parties may be involved in questions of compliance. It can show no prejudice in the litigation of the unfair labor practice here; and, as noted (*supra,* pp. 15-17), it will have the opportunity to litigate its own ability to remedy the unfair labor practice when compliance becomes an issue. In sum, respondent can rely upon neither a claim of inability to comply nor the asserted interests of other potential parties at the compliance stage, as a means to avoid the issuance of an order against it in the proceeding pending before this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

REPRESENTATIVES AND ELECTIONS

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided, further, That the bargaining

representative has been given opportunity to be present at such adjustment.

PREVENTION OF UNFAIR LABOR PRACTICES

* * *

Sec. 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional

evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.